SEBASTIANO ROBERT PAVONE

v.

PUBLIC PROSECUTOR & ANOTHER CASE

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NOS. 18/83 & 22/83]
6 SEPTEMBER 1983

CRIMINAL LAW AND PROCEDURE: *Prima facie case - Prosecution to establish - Calling of defence prior to determining credibility of witness - Whether amounts to wrongful provisional verdict of guilty - Conflict of testimony - Assessment of.*

The appellant, an Australian national who was a transit passenger on an aircraft en route to Sydney via Singapore, was stopped and searched by an Auxiliary Police Officer in the Search Room at the Bayan Lepas International Airport. A cloth pouch was found tied to the appellant's waist and when asked its contents, the appellant replied that it was fertiliser for his plants. The pouch was then slit open by another officer and two plastic bags were within, containing an off-white powdery substance.

An Anti-Narcotics Bureau Officer was summoned, who then proceeded to test the powder which was indicated to be opium. The test tube used was thrown away instead of submitting it to the Chemist for analysis. The powder was taken to the Government Chemist who certified it to be heroin. The appellant was thereafter prosecuted in the Sessions Court at Penang upon a charge alleging that he did on 7 August 1982 at 6.00 p.m. at the Bayan Lepas International Airport, in the State of Penang, traffic in a dangerous drug, to wit, 402 grammes of heroin, in contravention of the provisions of sub-section (1) (a) of s. 39B of the Dangerous Drugs Act 1952.

Upon these facts, the learned President of the Sessions Court overruled a submission of no case to answer and called for the defence. The appellant elected to say nothing and called no evidence. Counsel for appellant argued that appellant should have been discharged at the close of the prosecution's case because, *inter alia*, the discrepancy of evidence between the Anti-Narcotics Bureau Officer and the Government Chemist as to the kind of drug and that there was insufficient evidence that the powder examined by the Chemist was the same as that recovered from the appellant. The appellant was convicted and sentenced to life imprisonment. The appellant appealed and the Public Prosecutor cross-appealed on inadequacy of sentence.

Held:

[1] Any question of the veracity and accuracy of witnesses' recollection should be left only after the close of the case for the defence, even where the defence elects to remain silent. Determining such a question before calling the defence amounts to a provisional verdict of guilt which is wrong.

[2] As there was a misdirection by way of non-direction relating to a fundamental issue, the conviction was quashed.

[3] The evidence against the accused was overwhelming, therefore a re-trial was ordered. Public Prosecutor's appeal against sentence was dismissed.

[Conviction quashed. Cross-appeal by Public Prosecutor dismissed. Re-trial ordered.]

Cases referred to:
PP. v. Man bin Abas 1 MC 160
Haw Tua Tau v. PP [1982] 2 MLJ 49; [1981] CLJ (Rep) 11
Ragunathan v. PP [1982] 1 MLJ 139; [1982] CLJ (Rep) 63
Re Adam Aman Hoesin bin Ghani v. PP [1958] MLJ 229
Sia Soon Suan v. PP [1966] 1 MLJ 116
Rex v. Howe 2 MC 109

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 39B (1)(a)
Criminal Procedure Code (Cap 6), ss. 399, 422

Other sources referred to:
Haw Tua Tau v. PP - Duty of Court at end of Prosecution Case - Must we follow the Privy Council? [1981] JMCL Vol. 8 Part 1 & 2, p. 223

For the appellant/respondent - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent/appellant - Bazain Idris, DPP

JUDGMENT

Edgar Joseph Jr J:

At the conclusion of the arguments yesterday I said I would deliver judgment today which I now do.

This appellant was prosecuted in the Sessions Court at Penang upon a charge alleging that he did on 7 August 1982 at 6 p.m. at the Bayan Lepas International Airport, in the State of Penang, traffic in a dangerous drug, to wit, 402 grammes of heroin, in contravention of the provisions of sub-section (1)(a) of s. 39B of the **Dangerous Drugs Act, 1952** ("the Act"). He was convicted and sentenced to life imprisonment. Against this conviction he has now appealed. There is also a cross appeal by the Public Prosecutor alleging inadequacy of sentence and urging that there ought in addition to have been an order for whipping.

The facts appearing in the case for the prosecution fall within a short compass and may be stated thus: on the day, and at the time in question, the appellant, an Australian national, was a transit passenger on an aircraft en route to Sydney via Singapore and was stopped and searched by an Auxiliary Police Officer, Wan Mohamed bin Wan Ismail (PW1), in the Search Room at the Bayan Lepas International Airport. PW1 felt something tied around the appellant's waist and, upon being queried as to what this was, the appellant replied that it was "fertiliser for his plants." He was asked to remove it, which he did, and it was then observed that what was tied around the appellant's waist was a white cloth pouch which had been sown all round. Another officer, Azmi bin Yahaya (PW2), slit open the pouch and discovered two plastic bags (Exhibits P2 and P3), one inside the other, containing an off-white powdery substance. As these were suspected to be a dangerous drug, ASP. Fariduddin bin Dato Ahmad (PW7) of the Anti-Narcotics Bureau, Penang, and the Investigating Officer in the case, was summoned to test P3. He arrived three hours later and took a sample of P3, inserted it into a test tube taken from his test kit provided by his department, broke the seal inside, shook it, whereupon the liquid turned purple which, in his opinion, indicated that the substance was opium. He then reported the result of this test to Supt. Nathan Ha, his superior, but threw away the tube he used for the test and its contents instead of submitting it to the Chemist for analysis. Later, the appellant was placed under arrest and, in due course, P3, which was kept in a safe in the armoury of the police station at Bayan Lepas, was taken by PW7 to the Government Chemist who examined the contents and certified in

his report that the plastic bag concerned contained 1,105 grammes of an off-white substance which in turn contained 402 grammes of heroin, a dangerous drug as defined in s. 2 of the Act. A copy of this report was fully served upon the appellant, in accordance with the provisions of s. 399 of the **Criminal Procedure Code**, but he did not require the Chemist to attend the trial to give evidence.

Upon these facts, the learned President of the Sessions Court overruled a submission of no case to answer and called for the defence. The appellant elected to say nothing, called no evidence, and was duly convicted and sentenced as aforesaid. She however exercised her discretion in favour of the appellant and did not order any whipping.

Before me, the conviction has been attacked by Mr. Karpal Singh, with his usual vigour, chiefly on the ground that there being a discrepancy as between the evidence of PW7 on the one hand, and the Report of the Chemist on the other, as to the kind of drug P3 was, the learned President ought to have held, either, that there was insufficient evidence that what was examined by the Chemist was in fact the substance recovered from the person of the appellant or, alternatively, that the exact offence charged, namely, possession of 402 grammes of heroin, had not been proved by the prosecution especially since there was no evidence that heroin is a derivative of opium, and should accordingly have acquitted and discharged the appellant at the close of the case for the prosecution.

The learned President has written well-arranged grounds of decision and plainly recognised the force of these submissions but concluded by saying that she "could attach no weight to the evidence of the test conducted by PW7." She reasoned that there was "no evidence that PW7. had even the most basic training in Chemistry." Nor was there "any evidence as to what sort of test was used or whether PW7 was properly instructed on the use of it." She accordingly ruled that there was a case to answer and when the appellant elected to say nothing she observed that she had no alternative but to find him guilty as charged.

Before I proceed to consider Mr. Karpal Singh's submissions, I think I should make some comments on the above observation by the learned President even though neither Counsel did so. It is implicit in the observation that the learned President had determined the issue of the veracity and accuracy of recollection of the witnesses for the Prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict of guilty thus raising the question whether the appellant was deprived of the substance of a fair trial, a matter of the first importance in the administration of criminal justice in any country following a Common Law system.

Now, the sole question at the close of the case for the prosecution is whether or not a *prima facie* case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence. This applies even where, as here, the defence elects to remain silent and calls no evidence. Consequently, in a proper case, there is nothing illegal in a Magistrate or a President, or a Judge sitting alone or with Assessors, calling for the defence upon *prima facie* evidence being adduced and then proceeding to acquit and discharge even when the accused elects to remain silent and to call no evidence if not satisfied that the charge has been established by the prosecution beyond all reasonable doubt. In my opinion, therefore, the case of *PP v. Man bin Abas* 1 MC 160, would today have been differently decided.

It will be readily recognised that the above propositions are distilled from the judgment of Lord Diplock delivering the advice of the Judicial Committee of the Privy Council in the Singapore case of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 , approved and applied in the Federal Court decision of *Ragunathan v. PP* [1982] CLJ (Rep) 63, a decision which, of course, is binding on me notwithstanding the powerful dissent of Professor Ahmad Ibrahim in his comprehensive article entitled ***"Haw Tua Tau v. PP* - Duty of Court at end of Prosecution Case - Must we follow the Privy Council?"** [1981] JMCL Vol. 8 Part 1 & 2, p. 223.

I do not however consider this misdirection to be of any consequence because I am amply satisfied, having regard to the compulsive nature of the evidence for the prosecution which was uncontradicted by the defence, that the learned President would, on a proper direction, have still convicted: (s. 422 **Criminal Procedure Code).**

I now return to Mr. Karpal Singh's submission which I have referred to in paragraph five *supra*. Encik Mohd. Bazain bin Idris, the learned Deputy, replied that the learned President was perfectly entitled to prefer the report of the Chemist to the evidence of PW7 as to the kind of drug P3 was. In this, I think he is right. A Court of Trial when faced with a conflict of testimony frequently has to sift the evidence but this has to be done properly, so the question arises whether the learned President had gone about this task correctly.

I have already observed that she chose to disregard the evidence of PW7 for the reason that there was no evidence as to his competence to testify regarding the nature of the drug. Yet, at no time when PW7 was in the witness box did she put to him a single question to determine such competence nor did she summon the Chemist to testify in Court although she had ample powers and, indeed, was under a duty to do so, in order to satisfy the insistent demands for justice: *Re Adam Aman Hoesin bin Ghani v. PP* [1958] MLJ 229. It must be recognised that PW7 at the material time belonged to the Anti Narcotics Bureau, Penang, and was an officer of no mean rank, being then an Assistant Superintendent of Police. He was also the Investigating Officer in the case, and naturally, a principal witness for the prosecution. By calling him and not applying to have his credit impeached, the prosecution were representing him as a witness of truth. Not only that, he was armed with a test kit specially provided by his department for the purpose of checking for drugs. Presumably, therefore, he knew what he was talking about when he said P3 contained opium. On the other hand, in fairness to the learned President, neither did the Prosecuting Officer re-examine PW7 or apply to call the Chemist or even make a submission as regards this part of the case.

Clearly, therefore, PW7's competence was questioned for the first time by the learned President in her grounds of decision after Notice of Appeal was filed. In my view, she was perfectly entitled to prefer the Chemist's Report to the evidence of PW7 but, as I have already said, she had to go about this task correctly by probing the subject of PW7's competence in the way I have indicated above.

The requirements of strict proof in a criminal case,

said H.T. Ong, Acting Chief Justice (as he then was) in *Sia Soon Suan v. PP* [1966] 1 MLJ 116:

> cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...

In the circumstances, there being a misdirection by way of non-direction, in the course of the trial, which related to a fundamental issue and travelled to the root of the charge, the principle involved is more important than the case itself and so, the conviction cannot stand.

I next have to consider whether a retrial should be ordered. Mr. Karpal Singh has strongly urged upon me that to order a retrial would merely afford the prosecution a second opportunity of proving a case which they had failed to prove. I recognise the force of this submission and am mindful of the salutary observations of Murison, CJ, in *Rex v. Howe* 2MC 109, on this subject. But equally, I cannot overlook the fact that the unchallenged and uncontradicted evidence against the appellant was absolutely overwhelming. In this context, I would instance the circumstances in which the offending exhibit was recovered from his person, concealed in a cloth pouch cunningly tied around his waist, the fact that when queried as to it, he replied that it was fertiliser for his plants nor, for that matter, did he care to explain its possession when called upon for his defence in the Court below, although he faced a charge of the utmost gravity, carrying a mandatory sentence of life imprisonment with liability to whipping up to twenty four strokes of the ratan. Also, whether PW7's evidence or the Chemist's Report is accepted, the offending exhibit was still a dangerous drug within the meaning of the Act. Lastly, there is the element of public interest which is emphasized in the most stringent measures recently introduced by the **Dangerous Drugs (Amendment) Act 1983** to combat the drug menace which is now a national security problem.

I accordingly quash the conviction, set aside the sentence and direct a re-trial before another President. The appellant will be remanded in custody pending the re-trail. The Public Prosecutor's appeal against sentence is, in consequence, dismissed.

Also found at [1983] 2 CLJ 225